Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *Minister of Employment and Social Development v. J. P.*, 2017 SSTADIS 151

Tribunal File Number: AD-16-1318

BETWEEN:

Minister of Employment and Social Development

Appellant

and

J. P.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: April 7, 2017

REASONS AND DECISION

DECISION

The appeal is allowed.

INTRODUCTION

[1] This is an appeal of the decision of the General Division of the Social Security Tribunal (Tribunal) issued on August 28, 2016 that granted the Respondent's application for a disability pension , having found that her disability was severe and prolonged, for the purposes of the *Canada Pension Plan* (CPP), by her minimum qualifying period (MQP) ending December 31, 2016. Leave to appeal was granted on December 11, 2016, on the grounds that the General Division may have erred in rendering its decision.

OVERVIEW

[2] The Respondent was 48 years old when she applied for CPP disability benefits on October 7, 2014. In her application, she disclosed that she attended school up to Grade 12 and then went to work in group homes for mentally challenged individuals. In 1990, she took a job at the X Nursing Home, where she worked for the next 24 years in various capacities, ultimately as an activity director. Over time, she developed a number of conditions, including chronic depression, irritable bowel syndrome (IBS), osteoporosis and fibromyalgia. By 2012, her health problems had forced her to work shorter hours, and she was eventually terminated in September 2014 due to absenteeism, which she attributed to her conditions. As of the hearing date, she had not returned to work or attempted to seek alternate employment.

[3] The Appellant denied the application at the initial and reconsideration levels on the grounds that the Respondent's disability was not severe and prolonged as of the MQP. On August 4, 2015, the Respondent appealed these denials to the General Division.

[4] At a teleconference hearing held on August 16, 2016, the Respondent testified that her IBS started in the early 1990s, and that she now spends up to seven hours per day in the bathroom. Her fibromyalgia symptoms started about 15 years ago, and she experiences chronic

pain all over her body. Her depression began in 2003 and recurred in 2011. She did not see a mental health specialist until November 2015 because resources in her area were limited and she was able to talk to her niece, who is a psychologist. The Respondent stated that she often has thoughts of suicide and has isolated herself from the rest of the world. She has tried multiple medications for her depression and fibromyalgia but is unable to take many of them because of her IBS and the fact that she only has one kidney.

[5] In its decision of August 28, 2016, the General Division allowed the Respondent's appeal, finding that, on a balance of probabilities, she was incapable of substantially gainful work as of the MQP. The General Division considered the Respondent "as a whole" and found it unreasonable to expect her to work on a regular basis, particularly given her inability to take certain medications and the lack of mental health treatment options available in her area.

[6] On November 26, 2016, the Appellant filed an application for leave to appeal and notice of appeal with the Appeal Division of the Tribunal, alleging various errors of fact and law on the part of the General Division.

[7] In a decision dated December 11, 2016, the Appeal Division granted leave to appeal to the Appellant on the grounds that the General Division erred as follows:

- It preferred the oral testimony of the Respondent over objective medical evidence to the contrary and failed to explain why;
- It failed to apply the legal test, as stated in *Klabouch v. Canada*,[1] in considering whether the Respondent had capacity to work;
- It failed to apply the legal test, as stated in *Inclima v. Canada*,[2] in considering whether the Respondent made attempts at retraining or obtaining other employment than her former occupation, including part-time or sedentary employment.

[1] *Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33.
[2] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

[8] The Appeal Division also invited the parties to provide submissions on whether a further hearing was required and, if so, in what format. The Appellant filed submissions on January 25, 2017. The Respondent had not filed any submissions as of the decision date.

[9] I have decided that an oral hearing is unnecessary and that the appeal can proceed on the basis of the documentary record for the following reasons:

(a) There are no gaps in the file or need for clarification;

(b) The form of hearing respected the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[10] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal are the following:

(a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[11] According to subsection 59(1) of the DESDA, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or confirm, rescind or vary the decision of the Appeal Division in whole or in part.

[12] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an appellant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

[13] The calculation of the MQP is important because a person must establish that they had a severe and prolonged disability during the MQP.

[14] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if they are incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.

ISSUES

[15] The issues before me are as follows:

(a) How much deference should the Appeal Division show to decisions of the General Division?

(b) Did the General Division base its decision on erroneous findings of fact in preferring the oral testimony of the Respondent over objective medical evidence?

(c) Did the General Division err in law by failing to apply the principles from *Klabouch v. Canada* and *Inclima v. Canada*?

(d) If the answer to either of the two preceding questions is "yes," what remedy is appropriate?

SUBMISSIONS

Degree of Deference

[16] The Respondent made no submissions on this matter.

[17] The Appellant noted that the Federal Court of Appeal had not yet settled on a fixed approach for the Appeal Division in considering appeals from the General Division. The

Appellant acknowledged the recent Federal Court of Appeal case, *Canada v. Huruglica*,[3] which it said confirmed that the Appeal Division's analysis should be influenced by factors such as the wording of the enabling legislation, the intent of the legislature when creating the Tribunal and the fact that the legislature is empowered to set a standard of review if it so chooses. It was the Appellant's view that *Huruglica* did not appreciably change the standard to be applied to alleged factual errors; the language of paragraph 58(1)(*c*) of the DESDA continued to permit a wide range of acceptable outcomes.

[18] The Appellant submits that the Appeal Division should not engage in a redetermination of matters in which the General Division has a significant advantage as trier of fact. The wording of sections 58 and 59 of the DESDA indicates that Parliament intended for the Appeal Division to show deference to the General Division's findings of fact and to intervene only if a finding of fact is made in a "perverse or capricious manner" or is made "without regard to the material" before the General Division. However, no deference is to be shown by the Appeal Division to the General Division's decisions on questions of natural justice, jurisdiction and law.

Reliance on Subjective Evidence and Sufficiency of Reasons

[19] The Appellant alleges that the General Division made an erroneous finding of fact without regard to the material before it when it concluded that the Respondent had a severe and prolonged disability, relying heavily on her testimony that her conditions rendered her incapable regularly of pursuing any substantially gainful occupation, while ignoring the objective medical evidence to the contrary.

[20] The Appellant cited the Federal Court decision *Pantic v. Canada*[4] for the proposition that at least some objective medical evidence is required to support a finding of disability. It submits that this approach is embodied in paragraph 68(1)(*a*) of the *Canada Pension Plan Regulations* (CPP Regulations), which states:

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[3] *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.
[4] *Pantic v. Canada (Attorney General)*, 2011 FC 591.

> Where an applicant claims that he or some other person is disabled within the meaning of the Act, he shall supply the Minister with the following information in respect of the person whose disability is to be determined:
>
> (a) a report of any physical or mental disability including
>
> (i) its nature, extent and prognosis of the disability,
>
> (ii) the findings upon which the diagnosis and prognosis were made,
>
> (iii) any limitation resulting from the disability and
>
> (iv) any other pertinent information, including recommendations for further diagnostic work or treatment, that may be relevant.

[21] In *Giannaros v. Canada*,[5] the Federal Court of Appeal held that claimants must demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation." Medical evidence will still be needed as well as evidence of employment efforts and possibilities. Furthermore, a claimant bears the onus of proving that they suffer from a severe and prolonged disability prior to their MQP.[6]

[22] The Respondent was admitted to hospital for investigations as a result of missing time at work. She had a colonoscopy and ileoscopy, which were normal, noting no evidence of IBS. In his discharge summary, Dr. Schweiger noted that the Respondent's bowel movements were showing a "fast transit" and diagnosed her with "functional diarrhea" rather than IBS. He also observed that while the Respondent was in the hospital, her diarrhea was "markedly diminished" and he recommended that she change her diet.

[23] In fact, none of the medical documentation on file suggested that the Respondent was unable to work, yet the General Division accepted her testimony that she had no way of treating her fibromyalgia and depression "given her inability to take certain medications because of her IBS and lack of a kidney." While the Respondent indicated that she only had one kidney, she offered no objective medical evidence to show how this deficit affected her treatments or her ability to find substantially gainfully employment.

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[5] *Giannaros v. Canada (Minister of Social Development*), 2005 FCA 187.
[6] *Dossa v. Canada (Pension Appeals Board)*, 2005 FCA 387.

[24] The Appellant alleges that the General Division ignored material evidence and failed to consider the principles underlying the legal standard that claimants must meet in order to qualify for a CPP disability pension. In doing so, it disregarded *Inclima* and *Klabouch* and relied entirely on the Respondent's testimony, even though it could not be verified by objective medical evidence. In finding that the Respondent was disabled according to paragraph 42(2)(*a*) of the CPP, the General Division made inferences that were unsupported by fact or law.

ANALYSIS

Deference

[25] Although *Huruglica* deals with a decision that emanated from the Immigration and Refugee Board, it has implications for other administrative tribunals. In this case, the Federal Court of Appeal held that it was inappropriate to import the principles of judicial review, as earlier set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*,[7] to administrative forums, because the latter may reflect legislative priorities other than the constitutional imperative of preserving the rule of law: "one should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies."

[26] This premise led the Court to a determination that the appropriate test flows entirely from an administrative tribunal's governing statute:

> [T]he determination of the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context. An exercise of statutory interpretation requires an analysis of the words of the IRPA [*Immigration and Refugee Protection Act*] and its object… The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the IRPA and the role of the RAD [Refugee Appeal Division].

[27] The implication here is that the standards of reasonableness or correctness will not apply unless those words, or their variants, are specifically contained in the founding legislation. Applying this approach to the DESDA, one notes that paragraphs 58(1)(*a*) and (*b*) do not

[7] *Dunsmuir v. New Brunswick*, [2008] SCR 190, 2008 SCC 9.

qualify errors of law or breaches of natural justice, a fact that suggests the Appeal Division should afford no deference to the General Division's interpretations.

[28] The word "unreasonable" is nowhere to be found in paragraph 58(1)(*c*), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" or "without regard for the material before it." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division bases its decision on an error that is clearly egregious or at odds with the record.

Reliance on Subjective Evidence and Sufficiency of Reasons

[29] In essence, the Appellant argues that the General Division erred in law and fact by relying exclusively on the Respondent's subjective evidence, in the process ignoring two key tenets of the jurisprudence that governs the CPP disability regime: *Klabouch*, which holds that it is not the diagnosis, but the capacity to work, that determines the severity of a claimed disability, and *Inclima*, which imposes a duty on a claimant to make a reasonable effort to return to the workforce.

[30] My first task is to determine the extent to which the General Division is permitted to rely on subjective evidence. The Appellant correctly notes that the onus is on an applicant to show, on balance, that they are disabled, but it also insists that subsection 68(1) of the CPP Regulations requires an assessment of disability to be based on objective evidence. I do not see it that way. Subsection 68(1) states that an applicant *shall* supply the Minister with available medical reports, but it imposes no obligation on any assessor, including the General Division, to consider them or to give them more weight than other forms of evidence.

[31] For guidance on *how* evidence should be weighed, we must turn to case law. As was held by the Supreme Court of Canada in *Simpson v. Canada*, a trier of fact is presumed to have considered all the material before it and is usually afforded wide discretion in what weight to assign items of evidence. The Appellant cites *Pantic*, which itself cites the Federal Court of Appeal decision *Warren v. Canada*,[8] for the proposition that it is not an error of law to require

[8] *Warren v. Canada (Attorney General)*, 2008 FCA 377.

objective evidence of a disability; however, both cases upheld earlier decisions that discounted oral evidence at the expense of "objective" documentary evidence. In the present case, we have the opposite: The General Division is alleged to have discounted medical evidence and relied entirely on the Appellant's testimony. Still, it is one thing to ignore an applicant's feelings; it is another to seemingly ignore professional opinion, and there remains the bald statement in paragraph 4 of *Warren*:

> In the case at bar, the Board made no error in law in requiring objective medical evidence of the applicant's disability. *It is well established that an applicant must provide some objective medical evidence* [emphasis added].

[32] This is no offhanded aside, and it is consistent with prior judicial pronouncements on this issue, notably the Supreme Court decision *Villani v. Canada*,[9] which stated at paragraph 50:

> Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation." Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[33] In this case, the Respondent did submit "objective" evidence documenting her medical conditions, including bone mineral density testing results and reports from Dr. Pelletier, her family physician, Dr. Schweiger, a gastroenterologist, and Dr. Raherinaivo, a psychiatrist, all of which were prepared during the MQP. The Appellant's position is that none of these documents supported a finding of disability, but I am not sure it is possible to make so categorical a statement. Casual inspection of the file indicates that the Respondent's lumbar mineral density was within the osteoporotic range. Her family doctor wrote that the combination of her depression, IBS and fibromyalgia had led her to leave a physically undemanding job. Her psychiatrist diagnosed her with major depression and did not foresee a return to work in the immediate future. In my view, the General Division had at least some medical basis, beyond the Respondent's mere testimony, for finding that she suffers from, not just depression, but also IBS, osteoporosis and fibromyalgia. In submitting that the decision in favour of the Respondent was unsupported by medical evidence, the Appellant is in effect asking me to rehear the appeal on its merits, and this I cannot do given the constraints of

[9] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

subsection 58(1), which permits me to consider only a narrow range of alleged errors on the part of the General Division.

[34] However weak or strong the evidence may be, the General Division is entitled to assess and weigh it and draw conclusions regarding the severity of the Respondent's impairments. That said, I do find the General Division's decision problematic—although not because it contains an error of fact or law, but because it violates a principle of natural justice, specifically the obligation on a judicial body or administrative review tribunal to provide meaningful written reasons. The section of the General Division's decision in which it analyzes the severity of the Respondent's claimed disability contains seven paragraphs, including a fact-oriented introduction, four summaries of leading cases and a conclusion. In only one of the paragraphs does the General Division attempt to substantively apply the statutory definition of "severe" to the Respondent's particular situation, which I quote here in full:

> [23] When each condition is taken separately, it is possible to conclude that they may resolve given enough time and proper treatment. However, the Tribunal must look at the Appellant as a whole. Given her inability to take certain medications because of her IBS and lack of a kidney, she is having difficulty improving her depression and fibromyalgia. Also, there is a lack of mental health treatments available to her due to her location. And her depression and resulting lack of energy makes exercising to improve her fibromyalgia difficult. When taken together, it is easy to see how the Appellant's condition would be difficult to treat. Considering her symptoms, it is unreasonable to expect her to be able to work on a regular basis. She was already let go of one position due to her increasing absenteeism, and her conditions have gotten worse. She would not be able to guarantee to a future employer that she would be able to work on a regular basis.

[35] Although the General Division summarized some (though not all) of the medical evidence in its decision, it referred to none of it in its analysis proper, which seemed to start from the premise that the Respondent's conditions, in their totality, added up to a "severe" disability, with the only remaining question being whether treatment was possible. While the General Division cited *Klabouch*, I saw no indication that it made a distinction between diagnosis and disability, apparently taking it for granted that the Respondent's conditions by themselves left her functionally incapable of work. I agree with the Appellant that the decision evinced no real attempt to investigate how the Respondent's symptoms prevented her from regular employment, other than a flat declaration that they did. Similarly, while the General

Division duly summarized *Inclima*, it did not correctly apply it. Even if the Respondent did indeed suffer from depression, fibromyalgia, IBS and osteoporosis, the General Division was obliged to conduct an inquiry into whether she still had residual capacity to perform some form of work better suited to her symptoms. As the Appellant noted, there was no indication that the General Division considered whether the Respondent investigated retraining or alternative forms of employment and, if so, how her medical conditions prevented her from pursuing these options.

[36] A greater deficiency is in how the General Division addressed the Respondent's approach to treatment. There is a line of case law that requires a CPP disability applicant to take all reasonable steps to seek treatment, with a view to regaining as much capacity as possible.[10] The General Division implicitly acknowledged this duty by asking the Respondent what she had done to get well, but it then accepted at face value every reason she offered for eschewing recommended treatment: It was difficult to exercise, she testified, because she lacked energy; there was no access to mental health counselling because she lived in a remote area; she was unable to take medications because she was born with one kidney. Although there was little in the medical evidence to support these explanations, the General Division simply accepted them—the audio recording of the hearing indicates that the General Division did not ask the Respondent relevant questions such as whether there were any renal specialists overseeing her medication regime, and why she was permitted, having only a single kidney, to take some drugs but not others.

[37] An administrative tribunal's duty of fairness includes providing sufficient reasons for its decision—ideally there should be a chain of fact, law and logic that leads the reader to conclude that the outcome is defensible. Numerous cases[11] have held that failing to provide an analysis or reasons for a finding is an error on which a decision may be overturned. The specific question of how to measure medical evidence against subjective testimony has been addressed in *Canada v. Quesnelle*,[12] in which the Federal Court of Appeal criticized the now-defunct Pension Appeals Board for omitting to explain why it rejected a considerable body of

[10] *Bulger v. Minister of Human Resources Development* (May 18, 2000), CP 9164 (PAB).
[11] *Canada (Minister of Human Resources Development) v. Angheloni*, 2003 FCA 140; *Canada (Attorney General) v. Ryall*, 2008 FCA 164; *Canada (Attorney General) v. Fink*, 2006 FCA 354.
[12] *Canada (Minister of Human Resources Development*) *v. Quesnelle*, 2003 FCA 92.

credible evidence indicating that the respondent's disability fell short of severe. The Court also stated that, "without reasons that adequately explain the basis of a decision, neither party can be assured that, when a decision goes against it, its submissions and evidence have been properly considered." The Court held that, if the only justification for its decision was that testimony was credible, then it "could not pass muster as 'reasons' on any standard of adequacy."

[38] In this case, it is implicit that the General Division's decision rests entirely on a finding that the Respondent was believable—not just on the main question of whether her disability was severe, but also on the secondary question of whether she had good reason to forgo therapy. I note, however, that the decision never explicitly stated that the Respondent was credible, nor did it contain an explanation for why her word was valued more than the medical reports. In short, the General Division made no attempt to reconcile the oral evidence with what was in, or not in, the documentary evidence. In the absence of such an analysis, there is no way to know whether the General Division assessed the evidence or correctly applied the legal test.

CONCLUSION

[39] For the reasons discussed above, the appeal succeeds on the ground that the General Division failed to observe a principle of natural justice by failing to provide sufficient reasons for its decision.

[40] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. To avoid any apprehension of bias, it is appropriate, in this case, that the matter be referred back to the General Division for a *de novo* hearing before a different General Division member.

Member, Appeal Division